(12)

No. 85-701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FEDERAL ELECTION COMMISSION,

Appellants,

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLEE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League), pursuant to Rules 36.3 and 42 of the Rules of this Court, moves for leave to file the appended brief amicus curiae in this matter.

The League is a voluntary non-profit organization dedicated to the right to religious freedom and the right to life of all, born or pre-born. The League has a strong interest in the protection of expressional rights, especially in cases like this one in which the exercise of these rights is associated with the right to life. The League will often file amicus curiae briefs or initiate litigation to preserve expressional rights associated with matters in which the League is primarily concerned. For example, the League recently filed briefs amicus curiae before this Court in *Bender v. Williamsport Area School District*, No. 84-773, in which the right to free expression on religious matters was at issue. Similarly, League attorneys have served as attorneys in federal court for parties seeking to invalidate restrictions against speech on behalf of the right to life of the pre-born. *See Schultz v. Frisby*, 619 F. Supp. 792 (E.D. Wis. 1985), *appeal docketed* No. 85-2950 (7th Cir. Nov. 7, 1985).

The question of law which the League proposes to address is whether the press exemption of 2 U.S.C. § 431(9)(B)(i) should prevent the application of the involved federal election law to the special election edition newsletter published by Massachusetts Citizens for Life, Inc. The League takes the position that this statutory exemption to federal election laws should apply to the newsletter involved in this case. This issue will probably not be fully treated by the parties. Massachusetts Citizens for Life will likely not deal with this issue extensively because it is understandably likely to concentrate its efforts on upholding the favorable ruling issued by the Second Circuit on constitutional grounds. An attorney associated with Massachusetts Citizens for Life indicated to a League representative at one point that Massachusetts Citizens for Life might not be able to develop this

issue fully because of space limitations in its brief. The Federal Election Commission will not argue for a statutory exemption as the League will. This statutory issue is clearly relevant to this case because a ruling extending the statutory press exemption to the newsletter involved in this case would allow this Court to uphold the Second Circuit's ruling without deciding unnecessary constitutional issues.

The League has obtained the consent of counsel of record for Massachusetts Citizens for Life to the filing of this brief. The original of that letter has been filed with the Clerk. However, counsel for the Federal Election Commission has refused to grant such consent. Although counsel for the Federal Election Commission appears to have mistakenly believed that Rule 36.3 applies to the form of request for consent directed to a party rather than the form for motions for leave to file briefs amicus curiae, it appears clear from his letter filed with the Clerk that consent for the filing of this brief would be refused in any case.

For the foregoing reasons, the League moves to file the appended brief amicus curiae.

Respectfully submitted,

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APRIL 4, 1986

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INTEREST OF AMICUS CURIAE

The interest of amicus curiae is contained in the Motion for Leave to File Brief Amicus Curiae attached to this brief.

SUMMARY OF ARGUMENT

This Court can uphold the court of appeals decision on the basis that the special election edition newsletter published by Massacusetts Citizens for Life, Inc. fits within the statutory press exemption of 2 U.S.C. § 431(9)(B)(i). Thus, it is unnecessary to determine the constitutional issues presented.

The district court below correctly concluded that the special election edition newsletter fit within this press exemption to the rules restricting certain contributions to political candidates. *See Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 589 F. Supp. 646, 650-651 (D. Mass. 1984).

The district court appropriately rested its decision upon Congress' understandable intent to establish a press exemption coexstensive with broad First Amendment freedoms. *See id.* at 650. This intent is reflected in legislative history. The district court, for example, noted that a House Committee report stated that "it is not the intent of the Congress in the present legislation to limit or burden *in any way* the first amendment freedoms of the press or of association." *Id.* (quoting H. R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974) (emphasis court's)). Congress was certainly aware of the expansive scope accorded freedom of the press in this Court's decisions. In light of Congress' desire not to burden the exercise of freedom of the press, it would make little sense for Congress to make an essentially constitutionally based press exemption dependent upon factors such as a paper's masthead or normal circulation which have nothing to do with the presence of constitutionally protected freedom of the press. Accordingly, congressional intent, examined in light of relevant First Amendment precedent, requires the conclusion that Congress intended the press exemption to apply to the facts of this case.

This method of analysis is also supported by two lower federal court decisions construing the press exemption. Both of these decisions found publications in question to be within the press exemption despite Federal Election Commission arguments that certain technical requirements for the press exemption were not met. These cases correctly implemented Congress' desire that the involved legislation not impinge upon First Amendment freedoms. Application of their method of reasoning to this matter would properly permit dissemination of the special election newsletter without necessity to determine the constitutional validity of the federal election legislation.

ARGUMENT

I.

CONGRESS INTENDED 2 U.S.C. § 431(9)(B)(i) TO BE READ BROADLY IN ORDER TO AFFORD A PRESS EXEMPTION WHICH WOULD FULLY ALLOW DISSEMINATION OF PUBLICATIONS ENJOYING THE CONSTITUTIONAL PROTECTION OF THE FIRST AMENDMENT'S RIGHT TO FREEDOM OF THE PRESS.

In passing the legislation associated with 2 U.S.C. § 431(9)(B)(i), Congress wisely chose to include a press exemption. This action was intended to insure that the legislation would not be applied to cases, like this one, in which such application would offend constitutionally guaranteed freedom of the press.

Evidence of Congress' desire to prevent application of its legislation to cases implicating constitutionally protected freedom of the press may be found in a House of Representatives Committee Report. H. R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974) (hereinafter H. R. No. 1239). That report, as quoted by the district court, stated: "it is not the intent of the Congress in the present legislation to limit or burden *in any way* the first amendment freedoms of the press or of association." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 589 F. Supp. 646, 650 (D. Mass. 1984) (quoting H. R. Rep. No. 1239 at 4 (emphasis court's)).

Additional legislative history further reflects Congress' desire to permit the type of communication involved in this case. For example, much of the impetus for the enactment of the press exemption may be traced to concerns of Representative Orval Hansen that the original legislation not be construed to impede First Amendment freedoms. *See* H. R. Rep. No. 1239 at 4. For example, in debate on the enactment of the original legislation, Representative Hansen noted:

> As the Supreme Court stated in [*United States v. Congress of Industrial Organizations*], if Congress were to prohibit communications between an organization and its members concerning "danger or advantage to their

> interests from the adoption of such measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality."

117 CONG. REC. 43,380 (1971) (statement of Rep. Hansen) (quoting *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 121 (1948)).

Obviously Congress' desire was that the press exemption would protect all publications financed by voluntary contributors which are traditionally entitled to the enjoyment of freedom of the press. Congress was certainly well aware of the expansive protection which this Court's decisions have accorded freedom of the press in electoral matters. For example, in *Mills v. Alabama*, 384 U.S. 214, 218-220 (1966), the Court invalidated Alabama's attempts to prevent newspapers from including editorials on election day which urged people to vote a particular way in the involved election. The Court noted that:

> The Constitution specifically selected the press which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of powers by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

Mills, 384 U.S. at 218.

In light of clear legislative history and Congress' knowledge of the broad interpretation this Court has accorded freedom of the press in electoral matters, it defies logic and common sense to conclude that an essentially constitutionally based exemption depends upon such technical features as a newspaper's masthead or its ordinary circulation. The Second Circuit correctly concluded that the expressional activity involved in this case *was* constitutionally protected. However, a fair reading of legislative intent in light of this Court's

precedent could also have sustained dissemination of the newsletter on the basis of the application of the statutory press exemption.

II.

APPLICATION OF THE PRESS EXEMPTION TO THIS CASE ACCORDS WITH OTHER FEDERAL COURT CONSTRUCTIONS OF THIS EXEMPTION.

Support for a broad application of the press exemption intended by Congress can also be found in two previous lower court decisions construing 2 U.S.C. § 431(9)(B)(i). *See Federal Election Commission v. Phillips Publishing Co.*, 517 F. Supp. 1308 (D.D.C. 1981), *Reader's Digest Association v. Federal Election Commission*, 509 F. Supp. 1210 (S.D.N.Y. 1981). In both these cases the courts avoided utilizing overly technical analysis to deny statutory press exemption to normal press functions which would also enjoy constitutional protection.

For example, in *Federal Election Commission v. Phillips Publishing Co.*, 517 F. Supp. 1308 (D.D.C. 1981), the court did not find the content or the format of the specific issue of a political publication to be of great importance in deciding that the document was entitled to the protections guaranteed by the statutory press exemption. *See id.* at 1309-1314. The court utilized this constitutionally and statutorily correct mode of analysis despite the Commission's itemization of physical differences distinguishing the involved issue from others previously published by the same entity, and the Commission's determination that these differences precluded the utilization of the exemption found in 2 U.S.C. § 431(9)(B)(i). *See id.* at 1310-1311. In its decision, the court acknowledged that a publication need not be issued only to the current members or circulation, but that "[b]ecause the purpose of the solicitation letter was to publicize [the publication] and obtain new subscribers, both of which are legitimate press functions, the press exemption applies." *Id.* at 1313.

Similarly, in *Reader's Digest Association v. Federal Elec-*

tion Commission, 509 F. Supp. 1210 (S.D.N.Y. 1980), the court relied on the broad nature of the First Amendment in finding that the press exemption of 2 U.S.C. § 431(9)(B)(i) would protect a videotape which was produced to advertise a publication and was submitted to television stations for telecast, even though the tape depicted a political message directed at a candidate. This activity was found to be within the normal functions of a press entity. *Id.* at 1215. In so holding, the court accommodated the competing concerns of "the Commission's duty to investigate possible violations," and "the statutory exemption for the press combined with a First Amendment distaste for government investigations of press functions." *Id.* at 1215.

Both lower courts made their determinations based on interpretations of the statutory press exemption which properly implement Congress' intent to protect the full exercise of freedom of the press. These courts correctly realized that Congress' intent was to establish a broad press exemption in 2 U.S.C. § 431(9)(B)(i) which would preclude application of the statute to constitutionally protected activity. Applying this mode of interpretation to the instant case would result in a conclusion protecting Massachusetts Citizens for Life's exercise of freedom of the press in communicating with its pro-life oriented clientele without calling into question the involved legislation's constitutional validity.

CONCLUSION

The Court of Appeals' ruling upholding Massachusetts Citizens for Life's right to publish its special election edition may be upheld on the basis that the newspaper is a publication fitting within the press exemption of 2 U.S.C. § 431(9)(B)(i) without the necessity of reaching the constitutional questions.

Respectfully submitted,

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